

1 (Off the record.)

2 JUDGE SIPPEL: Okay, as I
3 understand the state of things now, Ms.
4 Wallman, and correct me if I'm wrong, but I
5 understand that you are now proffering for
6 receipt into evidence and you're prepared to
7 make a motion to that effect are exhibits that
8 have been numbered, pre-numbered 136 to 143
9 and those incorporate the complaint and the
10 reply pleadings, with attachments, that were
11 used that were submitted and used in
12 connection with the complaint phase of this
13 case which was before the Media Bureau and
14 they precede the hearing designation order.

15 Is that basically correct?

16 MS. WALLMAN: Your Honor, that is
17 correct with respect to Exhibits 1 through
18 143. There were additional exhibits.

19 JUDGE SIPPEL: I understand. We
20 haven't gotten to that yet, but I'm talking
21 about 136 to 143.

22 MS. WALLMAN: 136 to 143. That's

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1 correct, Your Honor.

2 JUDGE SIPPEL: All right, that's
3 one grouping. The other grouping is 144 to
4 150 which is the sworn written testimony of
5 Mr. Herring and the two expert witnesses, or
6 is it three expert witnesses?

7 MS. WALLMAN: Three, Your Honor.

8 JUDGE SIPPEL: Three expert
9 witnesses. Is that correct?

10 MS. WALLMAN: That's correct. And
11 then the other three are accounted for by
12 their CVs --

13 JUDGE SIPPEL: Say that again?

14 MS. WALLMAN: The other three
15 exhibits, 148, 149, and 150 are accounted for
16 by the CVs and bios of the expert witnesses.

17 JUDGE SIPPEL: Oh, wait a minute,
18 curriculum vitae?

19 MS. WALLMAN: Yes.

20 JUDGE SIPPEL: You have to go slow
21 with me on that kind of thing. But I do know
22 what it is.

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1 (Laughter.)

2 I've just got to get there. CV
3 and bio. All right. That's all very
4 pertinent information.

5 All right, what we're talking
6 about here right now is exclusive. Certainly,
7 the written testimony is going to be received
8 in due course, with opportunity to object, but
9 this is a generic objection to generic
10 materials that we want to get a ruling in
11 right up front.

12 I'm recasting -- you should really
13 say for the record, you should make a formal
14 motion to receive as your exhibits number 136
15 through 143 and then describe generically what
16 they are.

17 MS. WALLMAN: Yes, Your Honor.

18 JUDGE SIPPEL: Would you make that
19 motion, please?

20 MS. WALLMAN: Yes, Your Honor.
21 WealthTV moves for acceptance in evidence
22 Exhibits No. WealthTV Exhibit 136 through

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1 WealthTV Exhibit 143 and these are with
2 respect to each Defendant, WealthTV's carriage
3 complaint against such Defendant and the reply
4 to such Defendant's answer.

5 (Whereupon, the above-referred to
6 documents were marked as WealthTV
7 Exhibits 136 through 143 for
8 identification.)

9 JUDGE SIPPEL: And attachments to
10 those?

11 MS. WALLMAN: And attachments
12 thereto.

13 JUDGE SIPPEL: Now can you just --
14 in connection with that proffer or with that
15 offer, it's a motion, but it's an offer, would
16 you just briefly state what the relevance,
17 what the direct relevance of that evidence
18 would be to the hearing designation order, the
19 issues in the hearing designation order?

20 MS. WALLMAN: Your Honor, in each
21 of these complaints, the Complainant has
22 recounted the facts as known and believed to

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1 be true by the Complainant and the offices of
2 the Complainant.

3 These pleadings and attachments
4 were before the Media Bureau and formed the
5 basis of its decision to issue its memorandum
6 opinion and hearing designation order.

7 Among the attachments are the
8 declaration, affidavit, in fact, of Charles
9 Herring who will be offered as a witness
10 attesting to his belief in the truth and
11 veracity of the accounts in each of these
12 complaints. And they're offered for purposes
13 of showing how we got here.

14 JUDGE SIPPEL: Are you offering
15 them for the truth of everything that's -- the
16 complaint is just -- it's done very nicely,
17 but they're allegations, aren't they?

18 MS. WALLMAN: They're allegations
19 that the FCC's rules require to be verified by
20 the person putting them forward and they have
21 been verified through accompanying affidavit
22 of Charles Herring.

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1 JUDGE SIPPEL: Well, the verifying
2 affidavit simply says I've read the foregoing
3 and I believe them to be true. That's got
4 nothing to do with -- that's a verified
5 complaint. I know what a verified complaint
6 is. If you put one in District Court, it's
7 still going to be allegations.

8 MS. WALLMAN: The further
9 relevance of this, Your Honor, relates to the
10 arguments raised in our trial brief which are
11 that the burden shifts upon a finding of prima
12 facie violation of the law.

13 JUDGE SIPPEL: Well, that's an
14 interesting issue, but that's a preliminary
15 issue. I'm not going to lose sight of that,
16 but I'm just trying to figure out what am I
17 supposed to do? I take it these are pretty
18 numerous documents, complaint, reply, and
19 attachments. It's a pretty hefty piece of
20 work. Am I presuming right?

21 MS. WALLMAN: Yes, they are
22 significant in length.

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1 JUDGE SIPPEL: What am I supposed
2 to do with them?

3 MS. WALLMAN: Well, Your Honor, if
4 you do decide that the proper rule is that the
5 burden of proof shifts to Defendants, it very
6 likely would be relevant to Your Honor to know
7 what it was that formed the basis of the Media
8 Bureau's decision that there was a prima facie
9 violation.

10 JUDGE SIPPEL: Well, I can read
11 the hearing designation order. It was pretty
12 clear to me what they were thinking. I don't
13 think I've been misled by the hearing
14 designation order.

15 MS. WALLMAN: No, Your Honor, but
16 the materials that they had in front of them
17 are fully constituted by the complaint, reply,
18 and the case of Comcast. Comcast is also
19 moved for admission of their answer. I'm not
20 aware that the other Defendants have done
21 that.

22 JUDGE SIPPEL: Well, I don't have

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1 to --

2 MR. SOLOMON: There's been a
3 motion. Just to clarify, but Comcast, we
4 asked Your Honor to take official notice and
5 the reason we did that was merely because last
6 fall they had submitted their complaint and
7 reply as their initial proffer of evidence in
8 this case. So we know it's not evidence, but
9 we offered it for official notice in the event
10 that Your Honor chose to accept theirs as
11 official notice. But if you rule that --
12 which we think is correct, that complaints in
13 those pleadings don't belong as evidence, we
14 will withdraw those exhibits. We will not
15 move to have them admitted. They were simply
16 for defensive purpose.

17 JUDGE SIPPEL: All right. I'm
18 clear on that point.

19 But what do you want me to do? Do
20 you want me to go back and read all of those
21 complaints and things and then do a critique
22 of the hearing designation order and then say

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1 whether or not you all got it right?

2 MS. WALLMAN: No, quite --

3 JUDGE SIPPEL: I'm not even
4 allowed to do that.

5 MS. WALLMAN: Quite the contrary,
6 Your Honor. That's not what we intend to
7 invite.

8 JUDGE SIPPEL: Well, what do I do
9 with it then? You said that you wanted me to
10 have what was the underlying basis for the
11 hearing designation order. If I have it, what
12 am I going to do with it?

13 MS. WALLMAN: If Your Honor
14 decides that the rule -- that the proper rule
15 is to shift the burden of proof, then
16 conceivably Your Honor would like to know what
17 the record below was. And these complaints
18 and replies and in the case of Comcast, the
19 answer constitute the record below.

20 JUDGE SIPPEL: Wait a minute. I
21 told you very clearly that I am relying upon
22 the hearing designation order. I'm relying on

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1 the hearing designation order as prima facie
2 accurate of what went on before. I'm not
3 going to question anything the hearing
4 designation order -- there was a little bit of
5 a scuttle about 60 days, but that's got
6 nothing to do with what went on before.
7 That's what's going on now and after.

8 MS. WALLMAN: Correct, Your Honor.
9 But in my experience, even if a reviewing
10 Court and I understand the analogy is not
11 perfect here, but even in the case of a
12 reviewing Court that is relying on a fact-
13 finder's opinion, the adjudicator may wish to
14 look at the record that was before those who
15 made the initial determination.

16 I fully understand that that's in
17 Your Honor's discretion to look at it or not
18 and we offer for what it may be worth to
19 inform Your Honor's view about what was before
20 the Media Bureau when they decided that there
21 was a prima facie case.

22 JUDGE SIPPEL: Well, you know, I'm

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1 a little bit of a historian on stuff like this
2 and I don't know whether it's true or not.
3 Maybe it's apocryphal, but Justice William
4 Douglas had a reputation for calling up the
5 trial record before. He didn't just take the
6 briefs. He wanted the trial record up there
7 to go through the trial record and see what
8 the heck was going on in the case. But I
9 don't think that he really cared that much
10 about the complaint and the answer.

11 Now evidence is something
12 different. I don't need to do that because
13 what has been done is that the evidence under
14 those complaints and replies have been culled
15 and have been refined and I'm going to
16 basically get the same story, perhaps in a
17 different format, but in a much more efficient
18 way and a more timely way and in a fresh way
19 and in a de novo way.

20 If I start getting my head
21 cluttered up with what went on before and then
22 have to erase it to find out what's going on

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1 today, I don't think we're really going to
2 advance the case. So I don't know. I still
3 am not -- I still don't have a clear
4 understanding of what relevance to this
5 litigation those materials would have.

6 Let me hear from Mr. Cohen. Wait
7 a minute, do you have anything more? I'm --
8 here I am.

9 MS. WALLMAN: No, Your Honor. I
10 think you've got considered my arguments. It
11 was offered as a source of information to Your
12 Honor and if it's not useful, then I
13 understand your discretion.

14 JUDGE SIPPEL: Well, I don't want
15 to make it appear as though I'm denigrating
16 the materials. I'm simply saying is that I
17 only want to see what I need to see. I don't
18 want to see anything more because I've got
19 three of these cases lined up. I've got three
20 decisions to get out and if I start messing
21 around with everything and every phase of
22 these proceedings, we're all going to be in

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1 trouble.

2 So let me just leave it at that,
3 but again, I want to be very careful. I am
4 not denigrating the quality or the efficacy of
5 what went on in those complaints and reply
6 briefs. It's just that we are now at a
7 different phase and well, I just keep
8 repeating it.

9 Let me have a briefing from Mr.
10 Cohen.

11 MR. COHEN: Just very briefly,
12 Your Honor. You basically have said what I
13 would say, but the materials in this big, fat
14 binder that otherwise would have to go into
15 evidence include complaints and answers which
16 are just allegations.

17 The affidavits simply -- from the
18 fact witnesses on the Plaintiff's side or the
19 Complainant's side simply say it's true and
20 correct to the best of their knowledge,
21 information, and belief and one of those
22 affiants is not going to be presented here for

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1 cross examination. It contains the testimony
2 of Mr. Palmer, who has been withdrawn. So it
3 has lots of extraneous material.

4 I mean the fact of the matter is
5 this is a de novo hearing. It's their
6 opportunity to prove their case. This is
7 simply part of the record of this proceeding
8 and it's just not evidence. It's not evidence
9 and if it were considered as evidence, lots of
10 it would be objectionable as hearsay. We'll
11 have to spend a lot of time going through it,
12 page by page. I mean there's a declaration
13 from Mr. Robert Herring. He's not on their
14 witness list. There's an expert declaration
15 from Mr. Palmer. He's been withdrawn. They
16 would be disadvantaged.

17 There's a declaration from Stacy
18 Gray of IN DEMAND. She is not being proffered
19 as a Defendant's witness. We're on somebody
20 more senior, Mr. Asch. So this is historical.
21 It's how we got here in the same way that in
22 a Federal District Court trial one would not

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1 expect to see the complaint and answer and
2 summary judgment papers and any motion to
3 dismiss submitted into the record as evidence.

4 So we don't see any reason to
5 admit 136 through 143, and we should get on to
6 the actual evidence which basically covers all
7 of this material. .

8 JUDGE SIPPEL: Well, I've heard
9 enough on this. And with all due respect, I
10 really do not take this lightly, but in all
11 due respect, in light of the fact that this is
12 an expedited proceeding and that we're all
13 limited, well, maybe there are some parties
14 that are not limited. But I am limited in my
15 resources and for all of those reasons I'm
16 going to just -- I'm going to have to, as a
17 practical matter, if nothing else, but again,
18 this stuff is going to have relevance.

19 I mean the bottom line it doesn't
20 have the direct relevance and the direct
21 reliability that the de novo evidence has.
22 But I am going to deny the motion for the

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1 receipt into evidence of WealthTV's No. 137
2 through 143 for the reasons I've stated.

3 Now if you want to put them in the
4 record as an Appellate Exhibit, I'll reserve
5 on that. I don't see why it should have to
6 because as Mr. Cohen said, it is part of a
7 generic record and I don't think that you have
8 to burden -- we have to burden the --
9 everything -- burden the record in this case
10 with it, since it is already in the big record
11 and anybody reviewing it upstairs is going to
12 know what we're talking about. So right now,
13 I'm going to leave it out all together.

14 MS. WALLMAN: So by way of
15 clarification, you would not receive it as a
16 matter of official notice?

17 JUDGE SIPPEL: I'll take official
18 notice that there was a complaint and a reply
19 and related papers that were filed in this
20 case prior to the hearing designation order
21 and that they were relied upon by the Media
22 Bureau in issuing the hearing designation

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1 order. I mean I'll take official notice of
2 that. But that doesn't make it evidence --
3 that is not decisional evidence in this case
4 for me. It's not decision-worthy evidence.
5 It's historical evidence. It's important in
6 that respect, but it's not -- it's just not
7 going to be part of the decision. So don't
8 refer to it in your findings, please.

9 MS. WALLMAN: Thank you for
10 clarification.

11 JUDGE SIPPEL: Yes, ma'am. All
12 right, now let's -- where do you want to go
13 next? We can go with the 144 to 150 and then
14 back up to the --

15 MR. MILLS: Well, Your Honor,
16 there was this other grouping --

17 MR. COHEN: I don't think you're
18 offering. I don't think you're offering
19 anything that's not numbered.

20 MS. WALLMAN: There is the issue
21 of exhibits that were designated C through I.

22 MR. COHEN: Are you offering

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1 those?

2 MS. WALLMAN: Yes, we do intend to
3 offer those.

4 MR. COHEN: Then we have to talk
5 about those.

6 MR. MILLS: This is another group,
7 Your Honor, that has an odd numbering because
8 of historical reasons, but to clarify what it
9 is, this is what was referred to earlier as
10 pleadings that were filed in a different case.

11 MR. COHEN: That's true for C
12 through I.

13 MR. MILLS: For some of them. And
14 just to make it clear, the C, D, E, and F is
15 how they've been labeled.

16 JUDGE SIPPEL: All right, there's
17 nothing wrong with that, as long as it's
18 clear.

19 Could you describe more
20 specifically what that evidence represents?

21 MR. MILLS: This WealthTV's --

22 MR. FELD: If I may, Your Honor --

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1 JUDGE SIPPEL: Yes, sir. Mr.
2 Feld, is that correct?

3 MR. FELD: Yes, sir. Thank you.
4 These documents have been introduced with
5 regard to remedy. The documents in question
6 are a publicly-filed program access complaint
7 of DIRECTV in a separate case and IN DEMAND's
8 answer.

9 The program access complaint of
10 Echo Star which was related, the answer to
11 that complaint. In addition, we have moved in
12 Comcast Corporation's 10Q and 10K filings
13 which are filings for the Securities and
14 Exchange Commission; Time Warner's similar
15 filing in a Time Warner Cable press release
16 reporting their first quarter 2007 financial
17 results including unaudited financial
18 statements.

19 The purpose of these -- and is
20 there a second binder relevant for these
21 documents?

22 MS. WALLMAN: You've read them all

1 in.

2 MR. FELD: These documents,
3 collectively, are introduced for the remedy
4 phase of discussion when we discuss what is
5 the appropriate remedy and this tribunal is
6 permitted to order carriage and to specify
7 terms of carriage. The complaints that have
8 been provided and the answers that are
9 provided were discussions of Mojo in terms
10 which Mojo was offered to DIRECTV and to Echo
11 Star, where the Defendants argued well, these
12 are very fair terms of carriage for the
13 carriage of IN DEMAND programming. I think it
14 was INHD rather, I'm sorry, where they've
15 argued that this was appropriate rates for the
16 kind of programming they were offering.

17 Since our argument is that these
18 are substantially similar programming, we
19 think that it is appropriate at the remedy
20 phase to be able to offer evidence as to what
21 an appropriate contract would be and what
22 terms that the Defendants have previously

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1 argued that similarly situated programming
2 would be fair.

3 JUDGE SIPPEL: So this is
4 basically, what you're arguing is precedent
5 for the carriage and the terms of carriage
6 that you would be seeking?

7 MR. FELD: Yes, and the
8 Defendants, at least two of the Defendants'
9 own statements in previous or -- I'm sorry,
10 Time Warner -- but the statements of at least
11 some of the Defendants previously about the
12 similarly-situated programming with regard to
13 what they thought were fair terms to offer to
14 a third-party carrier.

15 JUDGE SIPPEL: All right. Let me
16 hear from Mr. Cohen on that.

17 MR. COHEN: Your Honor, let me
18 deal with these two groups. C, D, E and F are
19 DIRECTV's and Echo Star's complaints against
20 IN DEMAND and IN DEMAND's answer. I think at
21 the threshold this will be an issue throughout
22 the day.

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1 JUDGE SIPPEL: These are FCC
2 complaints?

3 MR. COHEN: Yes, they are.
4 They're program access complaints.

5 iN DEMAND, is not a Defendant in
6 this case. So we have heard multiple times
7 this morning about it's the Defendants'
8 admissions. iN DEMAND is an independent
9 entity of which these Defendants have
10 ownership interests.

11 iN DEMAND is not here as a party.
12 They're not represented. There was no party
13 discovery taken from them. They have not
14 appeared and what is said in a complaint by
15 unrelated parties against another non-party in
16 this case is rank hearsay.

17 Mr. Asch will be here. The
18 Defendants' witnesses will be here. If they
19 would like to cross examine any of those
20 witnesses about what terms of carriage were
21 offered by iNHD, not by Mojo, but by iNHD, to
22 these various, these two satellite providers

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1 in an effort to resolve a completely unrelated
2 program access complaint, they can do it. But
3 this is even worse than putting in the
4 pleadings in this case because I can't cross
5 examine Echo Star and I can't cross examine
6 DIRECTV as to the course of dealings.

7 To the extent that someone from IN
8 DEMAND has something to say about it, or they
9 think the Defendants have something to say
10 about it, they can raise those issues and they
11 can try to introduce portions of this during
12 the cross examination, but to say that Mr.
13 Herring who knows nothing about these, has no
14 personal knowledge. There's no foundation for
15 offering it through him. There's no basis for
16 putting these in as exhibits on their direct
17 case and they're filled with extraneous
18 materials.

19 JUDGE SIPPEL: All right, but
20 that's very significant, but Mr. Feld said --
21 the bottom line, what Feld said is what
22 previously had been agreed to by the parties

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1 in other situations was basically the carriage
2 terms and the rates that they were looking for
3 here.

4 MR. COHEN: There was no
5 agreement, Your Honor. That's why the program
6 carriage complaints or access complaints were
7 brought. There was no agreement.

8 JUDGE SIPPEL: Well --

9 MR. COHEN: If they would like to
10 introduce into evidence on cross examination
11 what were the terms that were offered by iNHD
12 to DIRECTV and to Echo Star and they establish
13 through an appropriate witness that those were
14 actually the terms, as opposed to what's
15 alleged in a hearsay complaint by DIRECTV and
16 by Echo Star, they can do that.

17 You can't just dump a complaint
18 and answer to nonparties into the record,
19 purportedly through Mr. Herring as the
20 sponsoring witness. He doesn't have any
21 firsthand knowledge.

22 So I'm not saying in the course of

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1 this proceeding it's not appropriate for
2 WealthTV to make its argument. We disagree
3 with it, of course, but if they want to make
4 the argument that the rate that should be set,
5 if Your Honor were to order the carriage,
6 which we don't think we'll be able to get to,
7 should be done by reference to what the iNHD
8 rate was in the course of negotiations with
9 DIRECTV and Echo Star. They can try to elicit
10 that testimony either through the Defendants
11 or through Mr. Asch, but not just by dumping
12 in a bunch of documents and claiming Mr.
13 Herring is the sponsoring witness.

14 JUDGE SIPPEL: You're starting to
15 repeat yourself.

16 MR. COHEN: Sorry, Your Honor.

17 JUDGE SIPPEL: I'm not trying to
18 affect your arguments, let me see if I can get
19 something from Mr. Feld on this.

20 I heard you say that all you
21 wanted to do is to use this evidence as kind
22 of a model or a template that would show the

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